No. 257

MAR 17 1921

JAMES D. MAHER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Respondent,
against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendant-Appellants.

Motion to Advance

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Edward Swann,
District Attorney of the County of New York,
Municipal Building, New York.

CHARLES D. NEWTON,
Attorney General.

WILBER W. CHAMBERS,
Solicitor for Charles D. Newton,
Attorney General of the State of New York,
51 Chambers Street, New York.

TERENCE FARLEY,
Solicitor for Lewis Nixon,
Constituting the Public Service Commission
for the First District,
49 Lafayette Street, New York.

JAMES A. DONNELLY
WILBER W. CHAMBERS
JOHN HOLLEY CLARK, JR.
HARRY HERTZOFF
Of counsel.

Supreme Court of the United States,

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Respondent, *against* CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Defendant-Appellants.	Cal. No.

Sirs:

PLEASE TAKE NOTICE that we will move the Supreme Court of the United States at Washington, D. C., pursuant to Rule 26 of the Rules of the Supreme Court of the United States, on Monday, the 14th day of March, 1921, at 12 o'clock noon, at the opening of said court for motions, or as soon thereafter as counsel can be heard, for an order advancing the above-entitled appeal on the docket

of said court for argument at the earliest particular date convenient to the Court.

Dated, New York, March 8th, 1921.

Yours, etc.,

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Edward Swann,
District Attorney of the
County of New York,
Municipal Building, New York.

WILBER W. CHAMBERS,
Solicitor for Charles D. Newton,
Attorney General of the
State of New York,
51 Chambers Street, New York

TERENCE FARLEY,
Solicitor for Lewis Nixon
Constituting the Public Service
Commission for the First District.
49 Lafayette Street, New York.

To:
SHEARMAN and STERLING, Esqs.,
Solicitors for respondent,
55 Wall Street, New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Respondent,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendant-Appellants.

To the Honorable Supreme Court of the United States:

The Appellants above named respectfully move to advance this cause on the docket of this Honorable Court pursuant to Rule 26, Subdivisions 6 and 7 of the rules of the Supreme Court of the United States.

The above-entitled appeal was brought by the appellants to review the orders of the District Court of the United States for the Southern District of New York, dated August 4th, and August 11, 1920, which declared unconstitutional Chapter 125 of the Laws of the State of New York of 1906, providing a rate for gas sold to private consumers of 80c per 1,000 cubic feet within certain portions of The City of New York because in contravention

of the 14th Amendment of the Constitution of the United States and Section 10, Article 1, thereof.

The relief prayed for in the bill of complaint in this action specifically reads as follows:

> "1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article 1 of the Fourteenth Amendment of the Constitution of the United States as aforesaid.
>
> 2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.
>
> 3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

The decree appealed from is upon the following conditions:

> "ORDERED, ADJUDGED AND DECREED that in case the defendants or any one of them shall within thirty days after the entry of final decree herein appeal therefrom to the Supreme Court of the United States, then and in that case the conditions imposed upon the continuance of the injunction in said decree shall continue until the determination of such appeal

and the special master appointed in said decree shall not distribute the moneys or bonds collected by him until such determination, and the surety bonds, if any, given shall continue in effect until the same time, notwithstanding any extension of time given to prosecute said appeal."

"Further ordered, adjudged and decreed that this order is made, and shall continue in effect only upon the condition that the defendants, and each of them, shall perfect and prosecute any such appeal, and print and file the record and all necessary papers to that end, promptly and without delay; and in the event that the plaintiff is at any time of the opinion that the perfecting of such appeal, the filing of the record, briefs, or other papers, or the bringing on of the appeal for argument, is being unreasonably and unnecessarily delayed by the defendants or any of them, it may apply to this court, upon notice, for such a modification of this order or other action as may be warranted in the premises."

That the said District Court further provided in said decree that complainant should be limited to a rate of $1.20 per thousand cubic feet sold to private consumers up to March 1, 1921, the excess over 80 cents per thousand cubic feet to be impounded pending action by the State authorities to fix a new rate. That in the opinion accompanying said decree the said District Court stated:

"I have provided that if the State does not act before March first, 1921, the plaintiff shall have all the fund and shall be free to charge what it pleases."

Complainant has also taken an appeal from several parts of this decree.

That appellants duly applied to have said limitation of rate to $1.20 per thousand cubic feet sold

extended beyond March 1, 1921, but said application was, on February 28, 1921, denied. That complainant has chosen to fix its rate at $1.50 per thousand cubic feet of gas sold, which said rate, an increase of 87½% over the statutory rate, is now being charged by complainant.

The complainant is now collecting the sum of $1.50 per 1,000 cubic feet, which rate it fixed and the excess over 80c is impounded with a Special Master appointed by the Court under the decree.

The number of consumers was stated by the complainant at the commencement of the suit to be over 498,660. There is no adequate remedy for the individual consumer who must pay the $1.50 rate or must submit to having his gas supply stopped or must enter into litigation with this respondent at an expense practically prohibitive. The number of citizens interested in this litigation as well as the amount involved is, therefore, unusually large.

The respondent herein uses the streets of the City of New York and enjoys the protection of its fire, police, water and other departments. The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration to the people of The City of New York, who are consumers of the respondent, and affects their health, happiness, comfort and convenience.

No private consumer of gas is a party to this suit as the expense of litigating the questions involved is so great that it is not within the power of any private consumer so to do. The City of New York moved to intervene as a party defendant, but was refused permission so to do.

The Special Master now has Liberty Bonds to cover the sum of $3,203,912.67 which he is holding

under the decree to await the result of this proceeding, and collected about $811,000.00 for the past month. It is estimated that he will collect about $1,200,000 per month until this appeal is determined.

The above-entitled action in which this appeal has been taken went to trial before a Master on July 22, 1919, and was completed in March, 1920.

That, although complainant alleged in its bill of complaint that the statutory rate of 80 cents per thousand cubic feet sold was and had been confiscatory from 1906 to 1917 inclusive, its claim in that regard was not sustained, the District Court holding only that the statute was confiscatory for the year 1918 and for 8 months of the year 1919, the period covered by full proof. As to the year 1918 the Court found that there was available for profits under the statutory rate the sum of $.1813 per thousand. As to the year 1919 the said Court found that there was available for profits under the statutory rate the sum of $.1169 per thousand cubic feet.

That one of the main questions involved is whether the Court erred in finding the statute confiscatory on the short period considered. Defendants claim that the entire period from 1906 to date should have been considered and that the statute should not have been declared confiscatory on the abnormal war period and post war period alone.

Similar questions of law arise in other cases involving the following gas companies operating within The City of New York.

1. East River Gas Company of Long Island City.

2. The New York Mutual Gas Light Company.

3. Northern Union Gas Company.

4. Central Union Gas Company.

5. Woodhaven Gas Company.

6. Newtown Gas Company.

7. Flatbush Gas Company.

8. Richmond Hill Gas Company.

9. Jamaica Gas Company.

10. The Standard Gas Light Company of The City of New York.

11. New Amsterdam Gas Company.

12. Brooklyn Union Gas Company.

13. New York and Queens Gas Company.

In most of these cases preliminary injunctions have been granted and deposits made with the Special Master which amount to a very large sum. The cause involves questions of the very greatest importance which have never yet been passed upon by this Court. In addition to this fundamental question, various other questions of very great importance are raised by this record, as well as questions whose importance are more peculiar to the present case; which questions are set forth in the assignment of errors of the appellants.

WHEREFORE your petitioners ask this Honorable Court for an order or direction advancing the above entitled appeal on the docket of said Court for ar-

gument at the earliest particular date convenient to the Court.

Dated, March 8th, 1921.

Yours, etc.,

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Edward Swann,
District Attorney of the County
of New York,
Municipal Building, New York.

CHARLES D. NEWTON,
Attorney General.

WILBER W. CHAMBERS,
Solicitor for Charles D. Newton,
Attorney General of the State
of New York,
51 Chambers Street, New York.

TERENCE FARLEY,
Solicitor for Lewis Nixon,
Constituting the Public Service
Commission for the First District,
49 Lafayette Street, New York.

JAMES A. DONNELLY
WILBER W. CHAMBERS
JOHN HOLLEY CLARK, JR.
HARRY HERTZOFF
Of Counsel.

OCT 4 1921
JAMES D. MAHER
CLERK

No. 257.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, District Attorney of New York County, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Respondent.

AFFIDAVITS IN OPPOSITION TO MOTION FOR REASSIGNMENT

CHARLES D. NEWTON,
Attorney-General of the State of New York,
Capitol,
Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant Newton,
Capitol,
Albany, N. Y.

JOHN P. O'BRIEN,
Solicitor for Appellant Swann,
District Attorney of the County of New York,
Municipal Bldg.,
New York City.

Supreme Court of the United States,

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, District Attorney of New York County; and LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District, Appellants, *vs.* CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent.	No. 257.

State of New York,
Southern District of New York, } *ss.:*

Wilber W. Chambers, being duly sworn, says:

I am solicitor for Charles D. Newton, as Attorney-General of the State of New York, one of the appellants in the above entitled cause, and have had throughout the care and charge of this case, both before the trial court and upon this appeal.

This case was advanced for argument and set down for October 10, 1921, by order of this court made on or about March 21st, 1921. Although the Consolidated Gas Company, respondent above

named, filed an affidavit and memorandum in opposition to the motion.

The complaint shows that respondent has over 498,660 consumers. The statutory rate is 80 cents. Since about the time the decree of August 11th, 1920, appealed from, was entered the company charged its private consumers up to March 1st, 1921, $1.20 per M and up to about August 1st, 1921, $1.50 per M, and is now charging, so I understand, $1.25 per M.

The appellants maintain that the statute in question is not confiscatory and respondent's consumers ought not to pay more than the statutory rate of 80 cents per thousand cubic feet, and that any rate in excess of that is unwarranted, unjust and unfair. For this reason we urge there should be no delay in disposing of this appeal, and we oppose the application for a postponement.

As appears by the affidavit of James A. Donnelly, verified September 30, 1921, hereto annexed, the briefs of the District Attorney of New York County were served on respondent's solicitors on September 19th, 1921.

As appears by the affidavit of Henry Straus, verified September 30, 1921, hereto annexed, galley proof and page proof of the Attorney-General's brief, were served on the solicitors for the respondent on the 19th and 23rd days of September, 1921, respectively.

I annex hereto and mark exhibit "A" a letter I sent to Messrs. Shearman & Sterling solicitors for respondent on the 19th of September, 1921, accompanying the galley proof.

On the 20th of September, 1921, said solicitors for respondent returned the galley proof accompanied by a notice which is hereto annexed and marked Exhibit "B."

I thereupon wrote said Shearman & Sterling a letter which is hereto annexed and marked Exhibit "C." In this letter I enclosed another page of the galley proof to take the place of the blank page.

To my letter of September 20th, 1921, marked Exhibit "C," I received a reply which I hereto annex and mark Exhibit "D."

On September 23, 1921, and accompanying the page proof, I wrote said Shearman & Sterling a letter, dated September 23, 1921, which is hereto annexed and marked Exhibit "E." To this letter I received a reply hereto annexed and marked Exhibit "F."

On September 24, 1921, I caused to be served on said solicitors pages 1 to 54 of the page proof of the brief to complete the two extra copies served on the preceding day; the letter which accompanied said pages is hereto annexed and marked Exhibit "G." These were returned by said Shearman & Sterling, accompanied by a letter which is hereto annexed and marked Exhibit "H."

On the 20th of September, 1921, I wrote the clerk of this court a letter which is hereto annexed and marked Exhibit "I," and to this letter I received a reply from the clerk which is hereto annexed and marked Exhibit "J."

On the 16th day of September, 1921, I called on the telephone the office of Shearman & Sterling, 55 Wall St., New York City, and asked to speak to Mr. Vilas who makes the affidavit upon this motion for reassignment of the argument in this case. I was informed that he was not in the office. Thereupon I said I would talk with the managing clerk, and a person who gave his name as Mr. Regan talked with me. I explained to him that due to a strike at the

printing plant of J. B. Lyon Company in Albany, N. Y., the printers with whom the Attorney-General is obliged by law to have his printing done, I would be unable to deliver the bound brief of the Attorney-General on Monday, the 19th of September, 1921, but would deliver galley proof on that day.

I understood from Mr. Regan's reply that there was no objection to this. I informed him then that I would serve page proof of the brief, on Friday, September 23, 1921, and would be able to give him the completed printed brief the following Monday, September 26, 1921.

This is the understanding referred to in my letters to Shearman & Sterling already above referred to.

Said Shearman & Sterling, as appears by the correspondence, returned the galley proof served on them on the 19th inst., and returned the page proof served on them on the 23rd of September, 1921.

In the affidavit submitted on behalf of the respondent and made by Charles A. Vilas, he says:

> "The solicitor for the principal appellant, the Attorney-General of the State of New York, in No. 257, has failed to serve any brief on the solicitors for the appellee, but has stated to me that the brief of the Attorney-General is in the process of preparation but named no date when it will be served."

The court will readily see that Mr. Vilas is mistaken. Galley proof was served on the 19th of September, 1921, and page proof on the 23rd of September, 1921, while his affidavit is sworn to on the 24th of September, 1921.

Moreover, after galley proof had been received by said Mr. Vilas on the 19th of September, 1921, he called me on the telephone and said he had received the galley proof and wanted to know if I

could not serve him with four copies. I said I would if possible serve page proofs on the 23rd of September, 1921, and give him more than one copy. At that time he made no objection whatever to receiving the galley proof or page proof and I explained to him why I had not given him the bound brief. It was the following day that he returned the galley proof personally. I also informed him during that telephone conversation and when he called on me on the 20th of September, 1921, that I would be able to serve the completed brief on September 26, 1921, and when he said I named no date when I would serve the completed brief, he has overlooked the fact.

I submit that the technical procedure on the part of the solicitors for the respondent ought not to prevail and the argument postponed. The only reason I did not serve the bound brief on the 19th of September, 1921, was because of the delay on the part of the printer. As stated in my letter, there has been a strike in the plant of the J. B. Lyon Company some time earlier in the year and the company was unable to turn out the work as fast as usual.

I firmly believe that I substantially complied with the rules of this court in regard to the service of briefs, and I ask that the motion to postpone the argument be denied and the case heard in accordance with the previous assignment.

WILBER W. CHAMBERS.

Sworn to before me this 30th day of
September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
New York City.

Exhibit "A."

Sept. 19, 1921.

Newton, *et al. v.* Consolidated Gas Co.

Messrs. Shearman & Sterling,
55 Wall St., New York City.

Gentlemen:

I am serving you with a copy of the galley proof, uncorrected, of the brief of the Attorney-General on the appeal in the above entitled cause, to the United States Supreme Court.

I called up your office the other day and explained to the managing clerk that the printers who do the printing for our office had a strike in their plant and consequently are behind in their work. I expected the brief would be finished by now but it will take a few days more to complete it.

I will send you the printed brief as soon as completed. If it will be of any assistance to you I will follow this galley proof up with page proof.

I regret I cannot give you the completed brief today, but am sure you will have it in ample time so that you will be ready for the argument of the case on October 10th.

Yours very truly,

WILBER W. CHAMBERS.

WWC-B
encls.

Exhibit "B."

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1921.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Appellee,
against
CHARLES D. NEWTON, Attorney-General for the State of New York, EDWARD SWANN, as District Attorney for the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District,
Appellants.
} No. 257.

TAKE NOTICE that the attached galley proofs, containing 114 printed sheets and one blank sheet, are returned to you on the ground that the same do not comply with the rules of the Supreme Court of the United States concerning briefs, are incomplete, and service is not admitted.

New York, September 20, 1921.

JOHN A. GARVER, ESQ.,
Solicitor for Appellee,
55 Wall Street,
New York City.

To:

WILBER W. CHAMBERS, Esq.,
Solicitor for Appellant, Chas. D. Newton,
Attorney-General.

Exhibit "C."

New York, Sept. 20, 1921.

Newton, et al. *v.* Consolidated Gas Co. of N. Y.

Messrs. SHEARMAN & STERLING,
55 Wall St.,
New York City.

Gentlemen:

I was surprised to receive today the returned galley proof which I sent you on the 19th instant, in this case, as per my letter of that date. After the receipt of this galley proof by you, it was my understanding from a telephone conversation with your Mr. Vilas, that this arrangement was satisfactory providing I followed the galley proof up with service of four copies of page proof by Friday, the 23rd instant, to which I assented.

As to the missing page in the galley proof served to you—and as I told Mr. Vilas today—this I can readily supply and enclose it herewith. The rest of the galley proof I am holding and you may have the same at any time. I will be glad to carry out my part of the arrangement and give you four copies of the page proof on Friday, September 23rd.

Yours very truly,

WILBER W. CHAMBERS.

WWC-B
enc.

Exhibit " D."

Shearman & Sterling
55 Wall Street.
New York, September 21, 1921.

WILBER W. CHAMBERS, Esq.,
19 Chambers Street,
New York City.

Newton, et al. v. *Consolidated Gas.*

Dear Sir:

Referring to yours of September 20, I see no reason for your being surprised at the return of the galley proof. Mr. Buchner called me up on September 10 asking if I would accept a gally proof in lieu of the bound brief, I told him I would advise him after consulting other counsel. He sent over a stipulation both in this and the New York & Queens case, which I returned to him on September 12 with a letter stating that we felt obliged to insist upon complete compliance with the rules of the Supreme Court regarding the service of briefs.

Yours very truly,

CAV/DR C. A. VILAS.

Exhibit " E."

New York, September 23, 1921.

Newton, et al., *v.* Consolidated Gas Co. of N. Y.

MESSRS. SHEARMAN & STERLING,
Attorneys, etc.,
55 Wall St., New York City.

Gentlemen:

In accordance with the understanding I had with your managing clerk I am serving you with

page proof of our brief on the appeal in the above entitled case.

You will notice two of the copies lack pages 1 to 54, inclusive. Through an error these did not reach me today but will be here tomorrow and I will send them down to you.

Yours very truly,

WILBER W. CHAMBERS.

WWC:B

Exhibit "F."

Shearman & Sterling
55 Wall Street
New York, September 23, 1921.

WILBER W. CHAMBERS, Esq.,
49 Chambers Street,
New York City.

Dear Sir:

You have had no understanding whatever with our Managing Clerk above serving page proofs of your brief. I informed Mr. Buchner in writing on September 12 that I would insist upon the Supreme Court Rules regarding service of briefs. The packages accompanying your letter of September 23 are returned and service is not admitted.

Yours very truly,

C. A. VILAS.

CAV/DR

Exhibit "G."

New York City, Sept. 24, 1921.

Newton, et al. *v.* Consolidated Gas Co. of N. Y.

Messrs. Shearman & Sterling,
55 Wall St., New York City.

Gentlemen:

In accordance with my letter of the 23rd inst., to you, I am herewith serving you with pages 1 to 54, inclusive of the page proof to fill out the two copies of the brief I sent you yesterday.

Yours very truly,

WILBER W. CHAMBERS.

WWC-B

Exhibit "H."

Shearman & Sterling
55 Wall Street.
New York, September 24, 1921.

Wilber W. Chambers, Esq.,
49 Chambers Street,
New York City.

Dear Sir:

The package of proof sheets in Newton *v.* Consolidated Gas Company accompanying your letter of September 24 is returned for the reasons stated in our letter of September 23 and service is not admitted.

Yours very truly,

SHEARMAN & STERLING.

CAV/DR

Exhibit "I."

New York, Sept. 20, 1921.

Newton, *et al.*, *v.* Consolidated Gas Co. of N. Y.
October Term, 1921, No. 257.

C. Elmore Cropley, Esq.,
Asst. Clerk, U. S. Supreme Court,
Washington, D. C.

Dear Sir:

As you recall this case is set down for argument for October 10th, 1921.

The Corporation Counsel of the City of New York informs me that he has filed and served his brief.

Being aware of the three-weeks clause in the rules of the court in regard to filing briefs, I found that owing to a strike in the plant of the J. B. Lyon Company who do the printing for the Attorney-General, I would not be able to get my brief in this case finished so as to serve it on the 20th instant, and consequently I notified Messrs. Shearman & Sterling, solicitors for the respondent, of this.

On the 19th instant I served on Shearman & Sterling galley proof of our brief and informed them I would follow it up with page proof.

I will be able to file and serve my completed brief, I think, by next Monday.

I have before me your letter written to Mr. Buchner on August 31st in which you say that this rule is given liberal construction, and that if our briefs are served on the opposing counsel within a reasonable time prior to the reaching of the case and the requisite number of copies of the briefs filed, there will be no difficulties.

I am assuming that you will accept the brief in this case for filing even though I am a few days late in service. I will attach to the brief when filed an affidavit showing the exact date when same was served and the reason why the brief was not served a week earlier.

I would not want anything to happen to the case by reason of this delay in the service and filing of the brief.

Yours very truly,

WILBER W. CHAMBERS,
Solicitor for Newton, as
Attorney-General.

WWC-B

Exhibit "J."

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.
September 21, 1921.

Hon. WILBUR W. CHAMBERS,
Deputy Attorney General of New York,
New York City.

Dear Mr. Chambers:

I have your letter of September 20th in regard to your brief in the case of Newtown *et al.*, *v.* Consolidated Gas Company, No. 257 of October Term, 1921.

As suggested in my letter of August 31st to Mr. Buchner, the "three weeks clause" in the rule is not strictly enforced, and if such *were* the case, your having served opposing counsel with a proof copy of your brief on the 19th instant is a compliance with its literal provisions.

Under the circumstances, I think you need give yourself no concern in this connection. Your briefs will be filed when received here and no question will be raised by this office concerning the service on opposing counsel under the circumstances and the statements contained in your letter.

Very truly yours,

C. ELMORE CROPLEY,
Assistant Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, District Attorney of New York County, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District,
Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent.

No. 257.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } *ss.:*

CHARLES E. BUCHNER, being duly sworn, says:

I am an attorney connected with the office of the Attorney-General of the State of New York

and have been assisting the office of said Attorney-General in various matters relating to gas litigation.

On or about the 8th day of September, 1921, I called Mr. Vilas of the firm of Shearman & Sterling, solicitors for the Consolidated Gas Company of New York, and the New York & Queens Gas Company, on the telephone. I informed Mr. Vilas that we were having difficulty in getting our brief in the case of Newton *et al v.* Consolidated Gas Company of New York, from the printer. That under a State law we were obliged to have the said brief printed by the J. B. Lyon Company of Albany, N. Y., and that the said J. B. Lyon Company, due to serious labor troubles, was behind in its work and could not therefore complete our brief before the 19th day of September, 1921.

I informed him that as to the New York & Queens Gas Company we had not as yet received the record on appeal from the office of the clerk of the Supreme Court of the United States, and could not, therefore, prepare our brief in this case.

As to the Consolidated Gas Company case I informed him that we would serve upon the office of Shearman & Sterling, galley proof and page proof of our brief as soon as we received it from the printer, and that we expected to be able to serve our complete brief in this form within the time required by the rules of the Supreme Court of the United States or shortly thereafter. I thereupon asked Mr. Vilas whether he would stipulate under these conditions, that the Attorney-General might file and serve his briefs in the above entitled cases on or before the 1st day of October, 1921. Mr. Vilas thereupon replied that if his office received galley and page proof of the brief in the manner

hereinbefore set forth he would have no objection to signing such a stipulation. He added that he desired to confirm his opinion in this matter by conferring with other counsel and advised me to send to him two copies of the proposed stipulations in each of the above entitled cases. On the same day, to wit: the 8th day of September, 1921, I prepared and sent to Shearman & Sterling such stipulation, copy of which is hereto annexed and marked Exhibit "K."

Thereafter and on or about the 12th day of September, 1921, I received a letter from Shearman & Sterling, a copy of which is hereto annexed and marked Exhibit "L," stating that counsel in both the Consolidated and New York & Queens Gas case appeal would insist upon having appellants' briefs within the time prescribed by the rules of the Supreme Court of the United States. It was because of this the Attorney-General served as shown by the affidavit of Henry Straus, hereto annexed, printed proof of the brief on the 19th of September, 1921, within three weeks before the argument.

CHARLES E. BUCHNER.

Sworn to before me this 30th
day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
New York City.

Exhibit "K"

SUPREME COURT OF THE UNITED STATES.

CHARLES D. NEWTON, as Attorney-General of the State of New York, et al.,
Appellants,
vs.
CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent.

IT IS HEREBY STIPULATED AND AGREED, by and between the solicitors for the respective parties hereto that the appellants may file and serve their briefs in the above entitled matter on or before the first day of October, 1921, the court consenting thereto. It is furthermore understood and agreed that the appellants will send to the respondent such parts of their briefs from time to time in galley proof prior to the aforesaid first day of October, 1921, and beginning on or about the 20th day of September, 1921.

Dated, September 8, 1921.

.....
Solicitors for Respondent.

WILBER W. CHAMBERS,
Solicitor for Newton,
as Attorney-General of the
State of New York.

JOHN P. O'BRIEN,
Solicitor for defendant Swann,
as District Attorney of
New York County.

Exhibit "L."

Shearman & Sterling
55 Wall Street
New York, Sept. 12, 1921.

CHAS. E. BUCHNER, Esq.,
120 Broadway,
New York.

Dear Sir:

In view of the magnitude of the labor devolving upon counsel in both the Consolidated and the New York & Queens appeals, we feel that we must insist upon having the defendants' briefs within the time prescribed by the rules of the Supreme Court, or failing that, an adjournment of the argument corresponding to the extent of the delay in serving the briefs of the defendants.

Your stipulations returned herewith.

Yours truly,

SHEARMAN & STERLING.

V.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, District Attorney of New York County; and LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District,
Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent.

No. 257.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } *ss.:*

ANNA E. BURKE, being duly sworn, says:

I am over the age of twenty-one years and am assistant to the stenographer in charge in the office of the Attorney-General of the State of New York.

On September 26th, 1921, I served on a clerk in the office of Shearman & Sterling, 55 Wall Street, New York City, solicitors for the above named appellee, Consolidated Gas Company of New York, three copies of the brief of Attorney-General Newton, above named appellant, upon the appeal to this court, in the above entitled cause, by leaving with said clerk three copies of said printed brief.

On the 27th day of September, 1921, I filed with

the clerk of this court 30 copies of the said brief of Attorney-General Newton.

ANNA E. BURKE.

Sworn to before me this 30th day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
The City of New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, District Attorney of New York County, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District, Appellants, *vs.* CONSOLIDATED GAS COMPANY NEW YORK, Respondent.	No. 257.

State of New York, Southern District of New York, } *ss.:*

Henry Straus, being sworn says:

I am employed in the office of the Attorney-General of the State of New York and am over 21 years of age.

On the 19th day of September, 1921, I served on Shearman & Sterling, solicitors for the above named Consolidated Gas Company of New York, printed galley proof of the brief of Attorney-General Newton in the above entitled appeal in this court, by leaving said galley proof with a person in charge of said office of Shearman & Sterling, at No. 55 Wall Street, in the city of New York, that being the place designated by them for the service of papers.

In like manner as above I served on September 23, 1921, said Shearman & Sterling, at their office, 55 Wall Street, New York City, printed page proof of the brief on this appeal of said Attorney- General Newton, together with two extra copies thereof, excepting pages 1 to 54, inclusive.

HENRY STRAUS.

Sworn to before me this 30th
day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
New York City.

SUPREME COURT OF THE UNITED STATES.

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Appellants,

against

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent.

No. 257.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
CITY, COUNTY AND STATE OF NEW YORK, } ss.:

JAMES A. DONNELLY, being duly sworn says:

That he is an Assistant Corporation Counsel of The City of New York, and as such appears herein as Counsel to Hon. JOHN P. O'BRIEN, Corporation Counsel, solicitor for the appellant, EDWARD SWANN, as District Attorney of the County of New York, State of New York.

That he has read the affidavit of Charles A. Vilas in support of the motion for reassignment of the argument of the within appeal.

A motion was made by the appellants to advance the argument of the appeal herein on March 17, 1921, and was strongly opposed by the respondent. This court set the case for argument on October 10, 1921.

The brief on behalf of the appellant, Edward Swann, was served upon the solicitors for the respondent on September 19, 1921, and filed in the office of the clerk of this court immediately thereafter.

Upon information and belief that a proof of the brief of the appellant, Attorney-General was served upon the solicitor for respondent on September 19, 1921, and that page proofs of the same were served a few days thereafter in accordance with an arrangement entered into between Mr. Chambers, Deputy Attorney General, and Mr. Vilas, of counsel for the respondent, and that several copies of said brief were served upon the respondents on September 26, 1921, and filed with the clerk of this court on September 27, 1921.

While the case was proceeding before the Master, the complainant was most strenuous in its insistence that the trial be expedited as rapidly as possible. There is now impounded pursuant to the decree appealed from the sum of $9,716,524.09, which represents the amount collected since August, 1920, from the consumers of this Company above the statutory rate of 80c. per one thousand cubic feet of gas. The Company is now operating under a rate fixed by itself, and is undoubtedly anxious to continue operating under said rate indefinitely.

Answering the statement contained in Mr. Vilas' affidavit to the effect that the preparation of appellees brief has been retarded by Mr. Ransom's illness, deponent avers that Mr. Ransom has appeared before the Public Service Commission of the State of New York, on several occasions beginning September 12, 1921.

With reference to cases Nos. 258 and 288, the facts are as follows:

The appeal of the complainant in case No. 258 was perfected on or about March 18, 1921, and filed immediately after the appeal of the defendants in case No. 257. But in spite of the fact that the defendants had moved to advance case No. 257, no motion was made to advance the argument of the appeal in case No. 258 so as to bring it on for the same date as that set for the argument of the principal appeal. As to case No. 288, no motion has been made to advance this appeal up to the present time. There is no necessity for delaying the argument of the appeal in case No. 257 as the questions involved in the other two cases only apply to certain portions of the decree which are of slight importance.

It is respectfully submitted that the appellants have duly complied with the rules of this Court requiring the service of their briefs upon the appellee; that the interests of appellee's consumers who are now and for thirteen months last past, have been charged an excessive rate for the gas supplied to them by appellee demand an early adjudication of the issues herein, and that the appellee has alleged no valid or substantial reason for delay in the argument of the appeal.

Deponent therefore respectfully requests that the argument of said appeal proceed on October 10, 1921, the date assigned by this Court.

JAMES A. DONNELLY.

Sworn to before me this
30th day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
The City of New York.